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Before the
FEDERAL COMMUNICATIONS COMMISSION

1992 Cable Act, and on the highly speculative claim that operators will "unreasonably deny" access to their leased channels based on considerations other than the indecent nature of the programming to be presented. This assertion is without merit. NYNEX's petition should be denied.

NYNEX challenges two aspects of the FCC's First Report and Order adopting rules implementing the leased access indecency provisions of the 1992 Cable Act.[3/] First, NYNEX objects to the Commission's interpretation of Section 10(a) of the Act as giving operators "wide discretion" to ban programming the operator "reasonably believes" to be indecent, and allowing operators to ban some, but not all, indecent programming. Second, NYNEX opposes the Commission's determination that the courts, rather than the Commission, are the appropriate forum in which to challenge an operator's denial of leased access channel capacity on indecency grounds. Neither of these concerns warrants Commission reconsideration.

Section 10(a) provides:

> This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable

As the Commission recognized in its First Report and Order, this provision of the Act is self-executing, and "does not require, or grant specific authority to, the Commission to implement its provisions."[4/]

NYNEX claims that the Commission should read into this provision a requirement that operators may not discriminate among providers of "like" indecent programming -- that they must either carry all such programming or none. But, in disputing the Commission's determination that, in adopting their policy with respect to "indecent" programming, operators have "wide discretion", NYNEX can point to nothing in the statutory language of Section 10(a) to support its claim. Instead, NYNEX argues that the Commission's interpretation is in conflict with Sections 9 and 11 of the 1992 Cable Act. Upon examination, however, NYNEX's argument is not based on the language of the Cable Act at all.

Section 9 states only that the Commission has authority to "determine the maximum reasonable rate that a cable operator may establish" for use of leased access channel capacity and to establish reasonable terms and conditions for such use. NYNEX's argument instead hinges upon NYNEX's own position, as expressed in its comments in the rate regulation proceeding, that the Commission in adopting rules implementing Section 9 should "require cable operators to offer channel capacity to

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4/ Id. at para. 29.

unaffiliated entities on nondiscriminatory prices, terms and conditions, and to require that a cable operator may not refuse a reasonable request for channel capacity."[5/] Whether this approach has been adopted by the Commission in its rate regulation proceeding is not yet clear. But even so, it has no bearing on how cable operators may operate under the editorially-focused indecency provisions of Section 10 (a).[6/]

Through Section 10(a), Congress created an exception to Section 612. Section 10(a) restores to operators a measure of editorial control over leased access programming with respect to indecent programming on those channels -- editorial control that they may not exercise with respect to other leased access programming. In this limited respect, an operator may exercise discretion similar to that which it may exercise over all non-leased channels. Congress in amending Section 612, therefore, rejected the obligation of nondiscriminatory access to indecent programming which NYNEX seeks to reinstate.

5/ NYNEX Petition at 3 (referring to its comments filed in MM Docket No. 92-266).

6/ NYNEX also claims that Section 11 "requires the Commission to ensure that no cable operator can unfairly impede the flow of video programming from the video programmer to the consumer" NYNEX Petition at 3, and that the Commission's interpretation of Section 10(a) conflicts with this alleged policy of the Act. But Congress specifically did not intend that there be unimpeded access to indecent leased channel programming -- in fact, it adopted a policy requiring operators to either ban or block such access. Thus, Section 11 provides no support for NYNEX's interpretation either.

NYNEX also alleges that the Commission erred by failing to prohibit discrimination "among providers of like programming". This is an attempt to import a tariff concept to a non-tariff issue. And the Commission's interpretation that operators have discretion to prohibit some indecent programming, but not all, is both consistent with the statute and a much more reasonable approach to the issue than that proposed by NYNEX.

For example, under the 1992 Cable Act, operators for the first time are liable for the presentation of obscene programming on leased access channels.[7/] In the face of this potential liability an operator might opt not to air a particular program that fell close to the line of "obscenity". But the exercise of that discretion should not mean that all other indecent material must be barred as well. Conversely, an operator might "reasonably believe" -- albeit erroneously -- that a particular program is not "indecent". This reasonable determination to air a particular program should not mean that an operator must therefore provide access to all indecent programming. Given the potentially wide variety of "indecent" programming for which leased access channel capacity may be sought, the Commission properly recognizes that Congress granted operators "wide discretion" to implement their policies.

7/ Section 10(d) (amending Section 638 of the Communications Act).

Moreover, it is difficult, if not impossible, to conceive of how a determination could be made as to whether one indecent program is "like" another. The one example contained in NYNEX's petition implies that this determination depends on the identity of the program provider. NYNEX suggests that an operator would favor indecent leased access programming provided by an affiliate over indecent programming provided by an "unaffiliated" or "competing" entity. But Section 612 applies only to use by persons "unaffiliated" with the cable operator. Thus, NYNEX's mistaken concern about operators favoring affiliated "indecent" programmers on leased access channels should be no ground for imposing the additional requirements that it seeks.

Finally, NYNEX complains about the Commission's determination that the courts should be the forum for bringing complaints under Section 10(a) of the Act. The Commission's decision is entirely consistent with the statute. Under Section 612(d), any person "aggrieved by the failure or refusal of a cable operator to make channel capacity available for use pursuant to this section may bring an action in the district court of the United States for the judicial district in which the cable system is located to compel that such capacity be made available." Section 612 (d). The Commission's determination

that "the courts, rather than this agency" are the proper forum for resolutions of these disputes is thus entirely reasonable.[8/]

CONCLUSION

For the foregoing reasons, the Commission should deny NYNEX's petition for reconsideration.

Respectfully submitted,

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8/ In any event, the Commission in resolving disputes arising under the blocking provisions of Section 10(b) will entertain special relief petitions. See First Report and Order at n.55.

CERTIFICATE OF SERVICE

I, Naomi Aaltje Vlessing, certify that a copy of the foregoing OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION TO PETITION FOR RECONSIDERATION OF THE NYNEX TELEPHONE COMPANIES was served, this 21st day of April, 1993 by first class United States mail, postage prepaid, on the following:

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